30 **File Date: Sept 23 2005**

No. 05-381

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the Court held that an antitrust plaintiff alleging predatory selling must prove that the defendant (1) sold its product at a price level too low to cover its costs and (2) had a dangerous probability of recouping its losses once the scheme of predation succeeded.

The question in this case is whether a plaintiff alleging predatory *buying* may, as the Ninth Circuit held, establish liability by persuading a jury that the defendant purchased more inputs "than it needed" or paid a higher price for those inputs "than necessary," so as "to prevent the Plaintiffs from obtaining the [inputs] they needed at a fair price"; or whether the plaintiff instead must satisfy what the Ninth Circuit termed the "higher" *Brooke Group* standard by showing that the defendant (1) paid so much for raw materials that the price at which it sold its products did not cover its costs and (2) had a dangerous probability of recouping its losses.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states that Weyerhaeuser Company ("Weyerhaeuser") is a publicly owned company that does not have a parent corporation. No publicly owned company owns 10% or more of its stock. However, based on its Schedule 13G as filed with the Securities and Exchange Commission on February 14, 2005, Capital Research and Management Company is deemed to be the beneficial owner of 13% of Weyerhaeuser's common stock as a result of acting as an investment adviser to various investment companies registered under the Investment Company Act of 1940.

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Ball Mem. Hosp., Inc. v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986) 16, 25

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Betaseed, Inc. v. *U & I Inc.*, 681 F.2d 1203 (9th Cir. 1982) 28

Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) ..... *passim*

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 25

Cargill, Inc. v. *Monfort of Colo., Inc.*, 479 U.S. 104 (1986) 10, 15, 18, 25

Catalano, Inc. v. *Target Sales, Inc.*, 446 U.S. 643 (1980) 30

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Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) 26

Eastman Kodak Co. v. *Image Technical Servs., Inc.*, 504 U.S. 451 (1992) 15, 20, 21

FTC v. *Consolidated Foods Corp.*, 380 U.S. 592 (1965) 13, 28

FTC v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) 29

FTC v. *Motion Picture Adver. Serv. Co.*, 344 U.S. 392 (1953) 13, 28

FTC v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) 29

Harkins Amusement Enters. v. *General Cinema Corp.*, 850 F.2d 477 (9th Cir. 1988) 28

Houser v. *Fox Theatres Mgmt. Corp.*, 845 F.2d 1225 (3d Cir. 1988) 28

In re Beef Indus. Antitrust Litig., 907 F.2d 510 (5th Cir. 1990) 8, 15, 16, 28

JTC Petroleum Co. v. *Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999) 28

Kartell v. *Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984) 7, 9, 15, 23

Khan v. *State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996), *rev'd on other grounds*, 522 U.S. 3 (1997) 12

Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) 13

Mandeville Island Farms v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) 13, 14

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Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) ..... *passim*

Monsanto Co. v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) 21

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Northwest Wholesale Stationers, Inc. v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) 17

Palmer v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) 30

Quality Auto Body, Inc. v. *Allstate Ins. Co.*, 660 F.2d 1195 (7th Cir. 1981) 28

Reid Brothers Logging Co. v. *Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983) 28

Schad v. *Twentieth Century-Fox Film Corp.*, 136 F.2d 991 (3d Cir. 1943) 28

Seagood Trading Corp. v. *Jerrico, Inc.*, 924 F.2d 1555 (11th Cir. 1991) 28

Stearns Airport Equip. Co. v. *FMC Corp.*, 170 F.3d 518 (5th Cir. 1999) 20, 25

Telecor Communications, Inc. v. *Southwestern Bell Tel. Co.*, 305 F.3d 1124 (10th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003) 16

Town of Concord v. *Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990) 8, 24, 27, 28

Toys "R" US, Inc. v. *FTC*, 221 F.3d 928 (7th Cir. 2000) 28

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United States v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) 23

United States v. *AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003) 12, 25, 28

United States v. *Crescent Amusement Co.*, 323 U.S. 173 (1944) 13, 28

United States v. *Griffith*, 334 U.S. 100 (1948) 13, 28

United States v. *Patten*, 226 U.S. 525 (1913) 28

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 13

United States v. *Trans-Missouri Freight Ass'n*, 166 US. 290 (1897) 23

United States v. *Trenton Potteries Cos.*, 273 U.S. 392 (1927) 23

Verizon Communications, Inc. v. *Trinko, LLP*, 540 U.S. 398 (2004) 8, 22, 23

White Bear Theatre Corp. v. *State Theatre Corp.*, 129 F.2d 600 (8th Cir. 1942) 28

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15 U.S.C. § 22 27

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Miscellaneous:

P. Areeda & H. Hovenkamp, ANTITRUST LAW (2d ed. 2002) 18, 29

T. Barnett, Deputy Assistant Attorney General, Antitrust Division, *Antitrust Enforcement Priorities: A Year in Review* (November 19, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206455.pdf. 22

R. Blair & J. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991) 16, 29

R. Blair & J. Harrison, MONOPSONY (1993) 20, 22, 29

S. Calkins, *Comments on Presentation of Steven C. Salop*, 56 ANTITRUST L.J. 65 (1987) 29

F. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972 (1986) 7, 24

F. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) 21

P. Hammer & W. Sage, *Monopsony as an Agency and Regulatory Problem in Health Care*, 71 ANTITRUST L.J. 949 (2004) 29

J. Jacobson & G. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1 (1991) 29

W. Jones, *Concerted Refusals To Deal and the Producer Interest In Antitrust*, 50 OHIO ST. L.J. 73 (1989) 14

J. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and*

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Predatory Bidding?, 72 ANTITRUST L.J. 625 (2005) 18, 29

T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986) 29

F. Miller, *Health Insurance Purchasing Alliances: Monopsony Threat or Procompetitive Rx for Health Sector Ills?*, 79 CORNELL L. REV. 1546 (1994) 29

Brief for the United States and the Federal Trade Commission as Amicus Curiae Supporting Petitioner, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682) 7

R. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589 (2005) 12, 27, 29

R.H. Pate, *The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct* (Oct. 23, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/202724.pdf 7, 19, 21, 22

R. Posner & F. Easterbrook, ANTITRUST (2d ed. 1982) 29

S. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 ANTITRUST L.J. 669 (2005) 18, 22, 25, 29

Testimony of R.H. Pate, Assistant Attorney General Antitrust Division, Before the Committee on the Judiciary United States Senate Concerning Anti-trust Enforcement in the Agricultural Marketplace (October 30, 2003), *available at*

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http://www.usdoj.gov/atr/public/testimony/201430.pdf 12, 15, 16

R. Zerbe, *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L.J. 717 (2005) 18, 29

Weyerhaeuser Company ("Weyerhaeuser") respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 411 F.3d 1030. The order of the court of appeals denying petitioner's rehearing petition (App., *infra*, 48a) is unreported. The order of the district court denying petitioner's motion for judgment as a matter of law (App., *infra*, 28a-46a) is unreported. The order of the district court entering final judgment (App., *infra*, 47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2005, and a timely petition for rehearing was denied on July 8, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Sherman Act (15 U.S.C. § 2) provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize * * * any part of the trade or commerce among the several States * * * shall be deemed guilty of a felony * * *."

STATEMENT

This case involves a claim of predatory *buying*, in which the plaintiff alleges that the defendant violated Section 2 of the Sherman Act by paying too much for raw materials with the goal of forcing competitors out of business by raising their costs. In upholding a judgment for the plaintiff, the Ninth Circuit ruled that liability may be imposed in a predatory buying case if a jury concludes that the defendant purchased more raw materials "than it needed" or paid a higher price for them "than necessary," so as to prevent competitors

from obtaining those materials "at a fair price." The court of appeals refused to apply the standard that this Court has set out to govern predatory *selling* cases, where the plaintiff cannot prevail unless it proves (1) "that the prices complained of are below an appropriate measure of its rival's costs" and (2) that the defendant had "a dangerous probability[] of recouping its investment in below-cost prices." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993). It did so even though this Court's decisions in other antitrust contexts, and settled economic theory, draw no distinction between "buy-side" and "sell-side" claims.

The Ninth Circuit's holding is one of exceptional practical and doctrinal importance. *Brooke Group* rests upon this Court's recognition that "[p]rice is the 'central nervous system of the economy'" (*National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (citation omitted)) and that legal standards that chill ordinary price competition are therefore anathema to the Sherman Act. The Ninth Circuit's standard inevitably will have that precise adverse effect on price competition among buyers.

Businesses cannot know how to comply with a subjective standard that hinges liability on whether a jury believes that prices paid for materials are "necessary" or "fair." As a consequence, the decision below will generate pervasive confusion about what bidding and buying practices are permissible; will encourage baseless litigation; and will *diminish* buy-side competition by any firm that is subject to suit in the Ninth Circuit – which, under the Sherman Act's liberal venue provisions, includes *all* companies doing business nationwide – because firms will expect juries to be unable to distinguish between aggressive bidding and predation. The Ninth Circuit's decision thus will cause economic dislocation on a national scale: its rule potentially subjects *every* procurement decision by *every* business with market power in *any* industry to an antitrust challenge, undermining the ability of businesses to conduct their day-to-day operations.

By the same token, it hurts sellers of all inputs by crippling vigorous price competition for their wares.

In sum, the Ninth Circuit erred both in failing to apply *Brooke Group* and by adopting an extraordinarily vague standard that is inconsistent with the decisions of this Court and of other courts of appeals, which have emphasized the importance of objective standards in determining antitrust liability. Further review is warranted.

1. This case involves an allegation of predatory buying in the market for alder sawlogs in the Pacific Northwest. There are three principal participants in this market: timberland owners who supply the logs; production facilities, including lumber sawmills, that buy and process the logs into finished lumber; and purchasers who buy hardwood lumber from production facilities. App., *infra*, 2a-3a. The plaintiff, respondent here, was a sawmill operator that went out of business in 2001.[1] The defendant, petitioner Weyerhaeuser, also operates sawmills in the Pacific Northwest. Plaintiff has conceded the quality and efficiency of Weyerhaeuser's facilities; its state-of-the-art equipment and operations allow it to hold down costs and increase lumber yield. ER 284-293, 299-300, 338-339. From 1996 to 2001, the alleged predation period, Weyerhaeuser acquired approximately 65% of the alder sawlogs available for processing in the Pacific Northwest and sold all of the alder lumber it could produce. ER 173, 210, 300. Nine hardwood sawmills in the Pacific Northwest closed during this period, but four others opened and others expanded their operations. ER 96, 443, 444.

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[1] Plaintiff blamed rising log prices for its failure, although there was evidence that it suffered from substandard equipment, inefficient operations, increased natural gas prices, poor management, and inadequate capital reinvestment. See ER 137, 257, 261, 266 269-270, 285-287, 321-324, 625, 634-635.

There are many owners of standing timber in the Pacific Northwest, including the state and federal governments, at least seventeen private companies, and numerous individuals. These timberland owners sell their logs through oral bids, sealed written bids, and supply agreements. They all seek the highest possible price on each sale, frequently "shop[ping] th[eir] wood around the circuit" more than once to increase the bidding. Owners also may withhold their timber from sale – by leaving their trees uncut – in hopes of selling their logs later at a higher price. ER 123, 141, 166, 218-221, 242-243, 247-248, 367-368.

2. In this case, the plaintiff alleged that Weyerhaeuser violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by monopolizing or attempting to monopolize the alder sawlog market in the Pacific Northwest. In particular, the plaintiff's theory was that Weyerhaeuser overpaid for alder sawlogs, and occasionally stockpiled those it purchased, with the aim of driving competing sawmills out of business; once free of competition, the claim continued, Weyerhaeuser planned to recoup its overpayments by reducing future prices paid to log suppliers.[2] The plaintiff supported its allegation with evidence that sawlog prices increased though the price of finished lumber decreased during the predation period, that

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[2] The plaintiff alleged several other anticompetitive acts, but the court of appeals based its decision upholding the verdict for plaintiff entirely on evidence that could be taken to show "that Weyerhaeuser engaged in anticompetitive conduct by overbidding for sawlogs." App., *infra*, 18a. The plaintiff also asserted that Weyerhaeuser monopolized the output market for finished alder lumber, but the jury rejected that claim because alder competes with other hardwoods and there accordingly is no relevant market for finished alder lumber in the United States. ER 581-582. Weyerhaeuser plainly lacks monopoly power as a seller in the highly competitive market for hardwood lumber: it produces approximately 3% of the product sold in the North American hardwood lumber market. ER 405.

Weyerhaeuser had a dominant share of the market for alder sawlogs, and that Weyerhaeuser suffered declining profits due to the high prices it paid for raw materials. App., *infra*, 17a-18a. The plaintiff did not allege, however, that Weyerhaeuser paid so much for sawlogs that it sold its finished lumber at a loss, and it is undisputed that both Weyerhaeuser and its hardwoods division operated at a profit throughout the alleged predation period.

At the close of trial, the district court instructed the jury as follows:

> One of Plaintiffs' contentions in this case is that the Defendant purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price. If you find this to be true, you may regard it as an anticompetitive act.

App., *infra*, 7a n.8. The jury returned a verdict for plaintiff, awarding $26,256,406 in damages. This amount was trebled to $78,769,218. *Id.* at 4a.

3. The court of appeals affirmed. App., *infra*, 1a-27a. Weyerhaeuser argued that the jury instruction was wrong and the verdict insupportable because the plaintiff had not been required to satisfy (and could not have satisfied) the requirements of *Brooke Group* by showing (1) that Weyerhaeuser paid so much for logs that its price for finished lumber did not cover its costs and (2) that Weyerhaeuser had a dangerous probability of recouping the losses it incurred during the period of predation. The Ninth Circuit acknowledged that, "to establish liability under *Brooke Group*, a plaintiff ha[s] to show that its competitor operated at a loss and was likely to recoup its losses." *Id.* at 7a. But the court held that standard inapplicable in this case because "*Brooke Group* does not control in the buy-side predatory bidding context." *Id.* at 5a.

In reaching this conclusion, the Ninth Circuit reasoned that *Brooke Group* "established a high liability standard for sell-side predatory pricing cases because of its concern with the facts that consumers benefit from lower prices and that cutting prices often fosters competition." App., *infra*, 8a. But, the court continued, "an important factor distinguishes predatory bidding cases from predatory pricing cases: benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." *Id.* at 8a-9a; see also *id.* at 10a. Because the court of appeals accordingly held that "*Brooke Group* does not govern in this case," it ruled that the district court "did not need to instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of Weyerhaeuser's recoupment of its losses existed." *Id.* at 13a.

The court added that the instructions given – which told the jury to determine whether Weyerhaeuser purchased more logs than "necessary," paid a higher price than "needed," and prevented plaintiff from obtaining logs at a "fair" price" – "provided sufficient guidance regarding how to determine whether conduct was anticompetitive." App., *infra*, at 14a. The court went on to affirm the verdict under this instruction because it found evidence that Weyerhaeuser engaged in predatory conduct, had an intent to monopolize, and had a dangerous probability of achieving monopoly power in the relevant market. *Id.* at 12a-25a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision presents a question of great practical and doctrinal importance. The court of appeals held that a business accused of predatory buying may be held liable for trebled antitrust damages if the jury believes that the defendant purchased more inputs than it "needed" or paid a higher price for those inputs than was "necessary," so as to prevent rivals from obtaining inputs "at a fair price." This is

the sort of liability standard that Judge Easterbrook has equated with "[t]hrowing [a] marshmallow at a jury." F. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 978 (1986). Under the Ninth Circuit's wholly subjective rule, it is impossible for businesses to know what pricing decisions conform with the law; firms accordingly will be forced to curb aggressive – and desirable – competitive bidding for fear of triggering unwarranted liability; and baseless litigation will be encouraged.

As might be expected, the decision below is a striking departure from this Court's holdings. Then-Judge Breyer has demonstrated the practical impossibility "of determining what is a 'reasonable' or 'competitive' price" (*Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984)); in light of that concern, this Court in a series of decisions culminating in *Brooke Group* decisively rejected a "reasonableness" standard of antitrust liability in the context of alleged anticompetitive pricing in favor of rules that are objective, predictable, and consistent with the goal of encouraging aggressive competition. The Justice Department has endorsed this approach, seeking "to apply standards of single firm conduct that are transparent, objective and administrable, so that antitrust laws do not unduly interfere with the competition they are meant to protect." R.H. Pate, *The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct*, at 6 (Oct. 23, 2003), *available at* http://www.usdoj.gov/atr/public/ speeches/202724.pdf.

Against this background, the Ninth Circuit's repudiation of the *Brooke Group* standard in cases alleging predatory buying resurrects an antitrust dinosaur that this Court's decisions should have rendered extinct. The court of appeals announced a rule that requires businesses to ensure that their rivals are able to obtain necessary inputs at a "fair price." But as the United States recently put it in a brief to this Court, the Sherman Act "is not a license for federal courts to create codes of desirable business conduct." No. 02-682,

Verizon Communications, Inc. v. *Law Offices of Curtis V. Trinko, LLP*, Br. for the United States and the Federal Trade Commission as Amici Curiae, at 9. Because the decision below establishes an unintelligible and unadministrable standard, interferes with legitimate business practices and thereby *reduces* competition, conflicts with decisions of other courts of appeals (*e.g.*, *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 515 (5th Cir. 1990)), and throws the law into a state of confusion, further review plainly is warranted. Indeed, the Ninth Circuit's holding constitutes such a sharp departure from controlling antitrust principles that this Court may wish to consider summary reversal of the decision below.

A. All Allegations Of Predatory Pricing Behavior Must Be Evaluated Under Rigorous, Objective Standards

1. *The Standard Articulated in* Brooke Group *Rests on the View that Objective Rules Are Necessary To Distinguish Predatory from Competitive Pricing*

a. To appreciate the magnitude of the Ninth Circuit's error – and its destructive impact on competition – it is helpful to start with the principles identified by this Court in reviewing allegations of predatory pricing behavior. To begin with, it "is settled law" that an offense under Section 2 of the Sherman Act "requires, in addition to the possession of monopoly power in the relevant market, 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Verizon Communications, Inc.* v. *Trinko, LLP*, 540 U.S. 398, 407 (2004). Thus, "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Ibid.*; see *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, J.).

Of particular relevance here, the Court has viewed with great skepticism allegations that the requisite anticompetitive conduct took the form of a predatory pricing scheme, in which the defendant assertedly sacrificed available profits in an effort to drive competitors out of business. As the Court has explained in the context of predatory pricing by sellers, such a scheme "is by nature speculative" because the defendant must "forgo profits that free competition would offer." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). For such predatory conduct to be "rational," the defendant

> must have a reasonable anticipation of recovering, in the form of later monopoly profits, more than the losses suffered. * * * [T]he success of such a scheme is inherently uncertain: the short-term loss is definite, but the long-term gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits.

Id. at 588-589. "For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried and even more rarely successful." *Id.* at 589.

The Court also has recognized that unique considerations apply to legal standards for identifying anticompetitive pricing. Because of the critical role of price in our market system – as "the 'central nervous system of the economy'" – the Court has taken extraordinary care to fashion those standards to avoid chilling ordinary price competition. Pointing to this Court's decisions, then-Judge Breyer noted the "judicial recognition of the practical difficulties of determining what is a 'reasonable' or 'competitive' price." *Kartell*, 749 F.2d at 927-28. And the Court in *Matsushita* adopted a stringent liability standard because hard-charging pricing conduct that inefficient rivals label predatory "often is the very essence of

competition. Thus, mistaken inferences in [such] cases * * * are especially costly, because they chill the very conduct the antitrust laws are designed to protect." 475 U.S. at 594. Courts "'must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.'" *Matsushita*, 475 U.S. at 594 (quoting *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.)); see also *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 121 n.17 (1986) (emphasizing that "[c]laims of threatened injury from predatory pricing must * * * be evaluated with care" for the reasons identified in *Matsushita*).

Thus, "[t]here is * * * a general agreement that the antitrust courts' major task" in the context of standards for identifying unlawful pricing "is to set rules and precedents that can segregate the economically harmful price-cutting goats from the more ordinary price-cutting sheep, in a manner precise enough to avoid discouraging desirable price-cutting behavior." *Barry Wright*, 724 F.2d at 232 (Breyer, J.). And in doing so, it is emphatically *not* the goal of the antitrust laws to insulate inefficient competitors from the effects of hard competition. See *ibid.*

b. In response to these two fundamental principles, the Court in *Brooke Group* articulated its two-part test for assessing assertions of predatory pricing behavior by sellers. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. * * * As a general matter, the exclusionary effect of prices above a relevant measure of costs either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." 509 U.S. at 222.

If below-cost pricing is established,

> [t]he second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. * * * Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation.

Id. at 224. Absent such proof that the alleged predator "would likely" recoup its losses, "the plaintiff's case has failed." *Id.* at 226.

Brooke Group thus rests on the insight that schemes of price predation are rare, speculative, and self-deterring because they require the predator to suffer a loss now in hopes of obtaining uncertain benefits later. By the same token, the rule of *Brooke Group* is supported by the reality that it is very difficult to distinguish predation from tough competition and that "false positive" findings of liability will deter the very sort of aggressive competition that the antitrust laws were designed to encourage. *Brooke Group* responded to these concerns by insisting that antitrust plaintiffs who allege predation satisfy rigorous and objective standards of proof.

2. *Objective Rules Like Those Applied in* Brooke Group *Should Govern Allegations of Predatory Buying*

There is no doubt that Weyerhaeuser would prevail if the *Brooke Group* test applied here; the plaintiff made no attempt to prove, and could not have proved, either that the prices charged by Weyerhaeuser failed to cover its costs or that there was a "dangerous probability" the company could re-

coup its allegedly excessive payments for raw materials.[3] But the Ninth Circuit held such proof unnecessary here because it believed that predatory buying, as distinct from predatory selling, should be exempted as a matter of law from the *Brooke Group* requirements. This is so, the court reasoned, because "an important factor distinguishes predatory bidding cases from predatory pricing cases: benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." App., *infra*, 8a-9a. Therefore, the court held, "the standard for liability in this predatory bidding case need not be as high as in predatory pricing cases" because mistaken inferences of liability on the "buy side" are unlikely to chill desirable competitive conduct. *Id.* at 11a.

On the face of it, this is a most peculiar holding. Other courts have recognized that monopsony pricing – which, as the Ninth Circuit itself explained, is "[m]onopoly power exercised on the buy-side of the market" (App., *infra*, 6a) – "is analytically the same as monopoly or cartel pricing and so treated by the law." *Khan* v. *State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, J.), *rev'd on other grounds*, 522 U.S. 3 (1997). The Department of Justice's Antitrust Division agrees that "[m]onopsony is the mirror image of monopoly." Testimony of R.H. Pate, Assistant Attorney General Antitrust Division, Before the Committee on the Judiciary United States Senate Concerning Antitrust Enforcement in the Agricultural Marketplace, at 3 (October 30, 2003), *available at* http://www.usdoj.gov/atr/public/testi

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[3] Although there is some disagreement about the appropriate measure of costs when determining whether a predatory scheme (on either the sell or the buy side) resulted in the defendant selling its product below cost (see *United States* v. *AMR Corp.*, 335 F.3d 1109, 1118-19 (10th Cir. 2003)), Weyerhaeuser and its hardwoods division unquestionably sold its products at a profit throughout the period of the alleged predation under any standard.

mony/201430.pdf. "[M]ost antitrust scholars" likewise have concluded that "asymmetric treatment of monopoly and monopsony has no basis in economic analysis." R. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 590-91 (2005).

And this Court has many times examined allegedly anticompetitive uses of buying power without ever intimating that different rules apply depending upon whether buy- or sell-side conduct was involved.[4] We are not aware of another appellate decision that draws this distinction.

It therefore is not surprising that the Ninth Circuit's analysis departs from the principles announced by this Court in several related – and fundamental – respects. Indeed, each of the lower court's reasons for refusing to apply *Brooke Group* is squarely inconsistent with decisions of this Court and other courts of appeals.

a. The antitrust laws seek to assure that sellers benefit from aggressive competition by buyers. The Ninth Circuit opined that *Brooke Group* "established a high liability standard for sell-side predatory pricing cases" because "consumers benefit from lower prices and * * * cutting prices often fosters competition" (App., *infra*, 8a); in contrast, the court continued, there is no such necessary competitive benefit from aggressive bidding on the buy side and therefore no need for a "high liability standard" in monopsony cases. *Id.*

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[4] See, *e.g.*, *FTC* v. *Consolidated Foods Corp.*, 380 U.S. 592, 593-94 (1965); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209-10 (1959); *FTC* v. *Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 393, 395 (1953); *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948); *United States* v. *Griffith*, 334 U.S. 100, 107 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 803-04 (1946); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 181 (1944); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 178, 216, 219-20 (1940).

at 9a-11a.[5] In this, however, the Ninth Circuit plainly was wrong because the court wholly disregarded the interest of *sellers* in aggressive and unconstrained buy-side competition. From the seller's perspective, the "low" liability standard applied by the Ninth Circuit here threatens to discourage just as much desirable competitive behavior on the buying side – the willingness of buyers to compete hard to acquire goods – as the low standard eschewed by the Court in *Brooke Group* would have discouraged in the predatory selling context.

In its leading decision in this area, the Court held:

> The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. * * * The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Mandeville Island Farms, 334 U.S. at 236; see also, *e.g.*, *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 493 (1940).

Indeed, "[t]he passage of the Sherman Act was strongly influenced by injuries inflicted upon business firms; they were among the most obvious victims of the trusts. * * * The opportunity to sell at competitive prices has been protected as zealously as the opportunity to buy at competitive prices." W. Jones, *Concerted Refusals To Deal and the Producer Interest In Antitrust*, 50 OHIO ST. L.J. 73, 88, 89 (1989). The Antitrust Division agrees: "While we often speak of consumers as the targeted beneficiary of antitrust enforcement, suppliers also benefit, by having healthy incentives to provide the best products and services they can, with

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[5] The Ninth Circuit cited no authority of this (or any other) Court in support of this observation.

the expectation that they will be able to do so free from anti-competitive interference." Pate Testimony, *supra*, at 5.

Raising prices on the buy side therefore fosters desirable competition just as much as does lowering prices on the sell side. After all, as then-Judge Breyer put it, a buyer's "competitive instinct is to bid up price," and "[a]ntitrust law rarely stops the buyer of a service from trying to determine the price or characteristics of the product that will be sold." *Kartell*, 749 F.2d at 925. Thus, just as price cuts by sellers generally are desirable, competition by buyers that increases the price paid to suppliers "is almost certainly moving price in the 'right' direction." *Barry Wright*, 724 F.2d at 234 (Breyer, J.). Independent action to bid up the price paid to sellers accordingly should be encouraged because it is the sort of conduct that "appears always or almost always to enhance competition." *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 479 (1992).

The rationale that underlay the Ninth Circuit's decision in this case therefore was wrong: on the buy as well as the sell side, "the costs of an erroneous finding of liability are high." *Brooke Group*, 509 U.S. at 226. The mechanism by which a firm engages in predatory buying – increasing prices paid to sellers – "'is the same mechanism by which a [bidding] firm stimulates competition,'" which means that "'mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Ibid.* (quoting *Cargill*, 479 U.S. at 122 n.17) (ellipses in original).

Other courts of appeals recognize that fundamental point. Indeed, in a factual setting that is identical in principle to the one here, the Fifth Circuit dismissed an allegation of buy-side predation because the plaintiff failed to prove that the price paid for materials was so high that it prevented the defendant from making a profit. In *In re Beef Industry Antitrust Litig.*, 907 F.2d at 515, the plaintiffs alleged, among other things, that a beef packer "attempted to drive its competitors

out of the fed cattle procurement market by paying a higher price for fed cattle than the market suggested." The Fifth Circuit held that this claim failed because the plaintiffs

> presented no evidence that [the defendant] ever paid a predatory price (in this case, *a price higher than that which would allow the packer to make a profit*) for fed cattle. Thus, the cattlemen's allegation of predatory activity by [the defendant] in the cattle procurement market was not supported.

Ibid. (emphasis added). The decision below cannot be reconciled with the Fifth Circuit's holding.

Moreover, the Ninth Circuit's reasoning is incorrect even on its own flawed terms, because the court disregarded the ways in which buy-side competition that increases prices for sellers actually *does* benefit consumers. After all, it is generally accepted that consumers are likely to be harmed in the long run when the price paid to suppliers *decreases* because that diminishes the suppliers' incentive to provide goods; "a monopsonistic depression of price is as bad as a monopolistic increase in price." *Ball Mem. Hosp., Inc.* v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.).[6] And the converse is equally true: competition that raises prices *for* sellers helps the ultimate purchaser by en-

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[6] See R. Blair & J. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 299 n. 17 (1991); Pate Testimony, *supra*, at 5 ("If a buyer obtains market power * * *, and thereby is able to depress prices for the inputs it purchases below competitive levels, then producers of those inputs will have depressed incentives to produce, which will result in too few resources utilized to produce the inputs compared to what would be available in a competitive market. This is likely to harm both suppliers and consumers."); see also *Telecor Communications, Inc.* v. *Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1135-36 (10th Cir. 2002), (suppressing buy-side competition leads to reduced production and quality, and higher prices for consumers), *cert. denied*, 538 U.S. 1031 (2003).

couraging innovation and increased production *by* sellers. See generally *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985). It is a fundamental tenet of our economic system that prices fall and consumers benefit when the most efficient producers are able to obtain all the inputs they need. See *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958) ("[the Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources"). The court of appeals accordingly was wrong in its view that the aggressive bidding in this case did not benefit consumers.[7]

The Ninth Circuit also wholly ignored the procompetitive (or, at worst, innocuous) explanations for what a plaintiff may label excessive, or excessively costly, purchases on the buy side. As Professor Salop has explained, "increased purchases could be driven by an increase in demand for the firm's product or a new business plan that involves market share growth," or by "the firm adopting a new production process that uses the input more intensively," or "could reflect changes in inventory policy, such as where the firm chooses to hold more inventories to reduce the likelihood of

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[7] The Ninth Circuit acknowledged that rising prices sometimes encourage new producers to enter the market, but dismissed that possibility in this case because "[t]he nature of the input supply at issue here does not readily allow for market expansion." App., *infra*, 11a. But this reasoning misses the point. For one thing, the jury was not asked to make any finding on the matter. For another, even assuming that the Ninth Circuit's characterization of the alder log market was correct as a factual matter (we note that the court relied for its observation on an article by plaintiff's expert rather than the facts in the record in this case), the court disregarded the possibility that higher prices led timber owners to market logs that they otherwise would have withheld from sale, or led to increased production of competing hardwoods that could be substituted for alder.

shortages or to hedge against future input price increases." S. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 ANTITRUST L.J. 669, 682-83 (2005) (footnotes omitted);[8] see IIIA P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶ 768a4, at 143 (2d ed. 2002). The court below thus disregarded the "central message of the Sherman Act," which is "that a business must find new customers and higher profits through internal expansion – that is, by competing successfully." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985).

b. Predatory buying schemes are irrational unless there is a dangerous probability that the predator will recoup its losses. At the same time, the Ninth Circuit ignored another basic insight that undergirds the *Brooke Group* test. "[S]ince the losses" from a predatory scheme "accrue before the gains, they must be 'repaid' with interest" for the scheme to succeed. *Matsushita*, 475 U.S. at 592. This economic reality tends to make predation "self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly" to the defendant. *Id.* at 595. For this reason, "it is plain that the obstacles to the successful execution of a strategy of predation are manifold, and the disincentives to engage in such a strategy are accordingly numerous." *Cargill*, 479 U.S. at 121 n.17 (citation and internal quotation marks omitted).

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[8] We note that Professor Salop acted as a consultant to Weyerhaeuser in this case. On the other hand, two articles relied upon by the Ninth Circuit were written by, respectively, a paid consultant and an expert witness for plaintiffs in this case. See App., *infra*, 9a n.14 (citing J. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 655 (2005), and R. Zerbe, *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L.J. 717, 724 (2005)).

That is why *Brooke Group* required that a plaintiff alleging a scheme of predation demonstrate a dangerous probability that the defendant will recoup its losses. Indeed, as Former Assistant Attorney General Pate explained, "[t]he second part of the [*Brooke Group*] standard is especially important because there are a variety of situations in which it can readily be determined that an alleged predator has no prospect of future monopoly pricing." Pate, *Common Law Approach*, *supra*, at 21; see also *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989) (Easterbrook, J.). Proof of the likelihood of recoupment therefore should be necessary to establish the existence of an alleged predatory scheme even if, in the context of predatory buying, the Court did not also insist on a showing of below-cost pricing.

As both a logical and an economic matter, these points are every bit as true of buy-side as they are of sell-side predation. As two leading scholars of monopsony have observed:

> Successful monopsony predation is probably as unlikely as successful monopoly predation. First, the predatory firm would have to raise the price not only for the inputs it originally purchased, but would have to be prepared to purchase all of that input currently available in the market at the higher price. * * * In addition, in the long run, input suppliers that could substitute into the production of this input would have an incentive to do so, making the financial burden on the predatory firm even greater.
>
> Second, the firm has the problem of what to do with the input. One possibility is to destroy it; another is to store it. Any effort to process the input into its final output would likely increase the quantity of that output available and depress its price. All of these options create further financial burdens.
>
> Finally, once the firm begins to take advantage of its monopsony power by depressing the price of the input, ei-

> ther market conditions or actions by the monopsonist must hold off the reappearance of competing buyers. In effect, the buyer must be able to "profit" from the lower price for a long enough period of time that it can make up its predatory "investment." All of these hurdles mean that the prospects for the predatory buyer are probably as unlikely as they are for the predatory seller.

R. Blair & J. Harrison, MONOPSONY 66-67 (1993).

Accordingly, in the monopsony as in the monopoly context, the alleged predatory scheme cannot be thought to make sense unless the plaintiff is able to demonstrate a dangerous probability of recoupment.[9] This requirement is an element of the more general antitrust principle recognizing that, "[i]f the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted." *Eastman Kodak*, 504 U.S. at 468-469; *Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 528 (5th Cir. 1999) ("to survive summary judgment, a plaintiff must have evidence that the predation scheme is economically rational"). The Ninth Circuit erred when it failed to follow the approach specified by this Court and adopted by other courts of appeals and insist that plaintiff demonstrate the probability of recoupment here.

c. The considerations that underlay use of an objective standard in *Brooke Group* apply in cases that involve

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[9] Contrary to the Ninth Circuit's view (see App., *infra*, 16a-17a), "it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *Matsushita*, 475 U.S. at 589-90; see *id.* at 590 ("These observations apply even to predatory pricing by a single firm seeking monopoly power.").

allegations of predatory buying. Against this background, all of the considerations that supported the holding in *Brooke Group* are present here. An unwarranted finding of liability when predatory buying is alleged will discourage desirable competitive conduct, meaning that false positives could "'end up discouraging legitimate price competition.'" *Matsushita*, 475 U.S. at 594 (quoting *Barry Wright*, 724 F.2d at 234). False negatives, on the other hand, are a much lesser concern where predation is concerned because it is self-deterring, as "[m]onopoly prices eventually attract entry." F. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984). True predation by a single firm (whether buyer or seller) is "most difficult to differentiate [from] healthy competition on the merits." Pate, *Common Law Approach*, *supra*, at 5; see *Barry Wright*, 724 F.2d at 234 (Breyer, J.). And a predatory buying scheme will make economic sense only if the predator will be able to recoup the costs of predation.

There accordingly is no reason that the considerations giving rise to the *Brooke Group* test apply only in cases involving claims of predatory selling. To be sure, *Matsushita* and *Brooke Group* involved output price-cuts. See 509 U.S. at 223; 475 U.S. at 594. But nothing in those decisions indicates that the concern with "false positives" is limited to reductions in output price. To the contrary, *Brooke Group* used "legitimate price-cutting" as only one example of the sort of "competition on the merits" that an overly restrictive predatory pricing rule could chill. 509 U.S. at 223. Prior decisions had made clear that deterrence concerns arise whenever the challenged practice "appears always or almost always to enhance competition" (*Eastman Kodak*, 504 U.S. at 479) or the applicable legal rule threatens to "'inhibit management's exercise of independent business judgment'" (*Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (citation omitted)). More recently, the Court warned that "[t]he cost of false positives counsels against an undue

expansion of § 2 liability" even though the case at hand did not involve output price reductions. *Trinko*, 540 U.S. at 414.

In separating out the predatory goats from the socially desirable sheep identified by then-Judge Breyer, use of an objective test is imperative. Application of such "objective standards for the evaluation of monopolization and other single firm conduct" is a "priority" for the Antitrust Division. T. Barnett, Deputy Assistant Attorney General, Antitrust Division, *Antitrust Enforcement Priorities: A Year in Review*, at 3 (November 19, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206455.pdf.; Pate, *Common Law Approach*, *supra*, at 6. Scholars agree that, "given the complexity of a full-blown test for predatory buying and the low probability that it is a real threat to competition, a simple under-inclusive test may be appropriate." Blair & Harrison, MONOPSONY, *supra*, at 156; see Salop, *supra*, at 703. The Ninth Circuit accordingly departed from the clear and consistent direction given by this Court when it held that the test of *Brooke Group* should not govern claims of predatory buying.

B. The Ninth Circuit Confused The Law And Undermined Competition By Adopting A Test For Liability That Is Pegged To Whether A Jury Regards The Challenged Prices As "Fair" Or "Necessary"

Even if this Court were to conclude that a standard other than the one stated in *Brooke Group* should apply to predatory buying claims, review nonetheless is warranted in this case because the standard that the Ninth Circuit adopted is so clearly inconsistent with other decisions of this Court and the courts of appeals.

The court below determined that a defendant will be held liable for predatory buying if a jury concludes that the defendant "purchased more [product] than it needed or paid a higher price for [the product] than necessary," and that it did so "to prevent the Plaintiffs from obtaining the [product] they

needed at a fair price." App., *infra*, 7a n.8. It would be hard enough for an expert administrative agency to determine what price was "necessary" or "fair"; it is quite impossible for "a generalist antitrust court" (*Trinko*, 540 U.S. at 414) – let alone a jury – to make sense of that test. The Ninth Circuit's vague standard warrants review for four reasons in addition to its inconsistency with *Brooke Group*.

First, this Court has emphatically rejected use of a closely analogous "reasonableness" test under Section 1 of the Sherman Act. Then-Judge Breyer has explained:

> As the Supreme Court stated * * *, "[w]e should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable – a determination which can satisfactorily be made only after a complete survey of our economic organizations and a choice between rival philosophies."

Kartell, 749 F.2d at 929 (quoting *United States* v. *Trenton Potteries Cos.*, 273 U.S. 392, 397-98 (1927)); see also *United States* v. *Trans-Missouri Freight Ass'n*, 166 US. 290, 331-32 (1897); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 283-84 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899). Any contrary conclusion would "require judicial estimation of free market forces" (*Trinko*, 540 U.S. at 410), an approach this Court has decisively repudiated. The Ninth Circuit's approach is wholly inconsistent with this Court's rejection of a reasonableness test; the question whether a price is "fair" or "necessary" is, if anything, *more* subjective and indeterminate than that of whether it is "reasonable."

Second, the court of appeals' standard inevitably will lead to wholly arbitrary and unpredictable results – precisely the opposite of what this Court has required of legal standards governing allegedly anticompetitive pricing. Indeed, if the Ninth Circuit had set out to maximize capricious judicial outcomes with respect to the central issue of price, it could not

have done better than the standard it announced in this case. Again quoting then-Judge Breyer, writing in the context of an alleged "price squeeze":[10]

> [H]ow is a judge or jury to determine a "fair price"? * * * Is it the price the competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to determine the proper size of the price "gap"? Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And how should the court respond when costs or demands change over time, as they inevitably will?

Town of Concord, 915 F.2d at 25. The impossibility of giving consistent (or even intelligible) answers to these questions makes it inevitable that the outcomes in individual cases decided under a "fair" and "necessary" standard will be unpredictable and often erroneous. As Judge Easterbrook has put it, a "fog-bound instruction * * * ensures that confusion and random results will emerge," along with "false positives and false negatives." Easterbrook, *On*, *supra*, at 978.[11]

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[10] A "price squeeze" may arise when a firm operates at two levels of an industry and its competitors at one level are its customers at the other. "[A] price squeeze occurs when the integrated firm's price at the first level is too high, or its price at the second level is too low, for the independent to cover its costs and stay in business." *Town of Concord*, 915 F.2d at 18 (Breyer, J.).

[11] Compounding the problem, juries that are asked whether the price paid by a defeated rival for inputs was "fair" may not fully appreciate that "competition is a ruthless process. A firm that reduces costs and expands sales injures rivals – sometimes fatally. * * * These injuries to rivals are byproducts of vigorous competi-

Third, the Ninth Circuit held that a firm may be found liable whenever it cuts into a less efficient competitor's profits by moving aggressively to safeguard a supply of essential inputs, if a jury concludes that the competitor was deprived of a "fair" price. But this Court repeatedly has indicated that the antitrust laws do not "protect competitors from the loss of profits" caused by a rival's aggressive competition, explaining that a contrary approach would have the "perverse" effect of "render[ing] illegal any decision by a firm to cut prices in order to increase market share." *Cargill*, 479 U.S. at 116. The holding below would appear to mean that, the more *inefficient* a competitor is, the more solicitous its rivals must be. But businesses that take advantage of their low cost structures and efficient operations to out-compete their less-efficient rivals are engaging in conduct that is *encouraged* by the antitrust laws: when, as in this case, the nature of the complaint is that the plaintiff was damaged by aggressive competition, "[i]t is inimical to the purposes of these laws to award damages for the type of injury claimed." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

Fourth, to the extent the Ninth Circuit's test has any substance at all, it resembles "a loose profit sacrifice test" (Salop, *supra*, at 714), instructing the jury to condemn Weyerhaeuser for failing to maximize its short-term profit when it paid more for logs than the jury deemed "necessary." But other courts of appeals have expressly rejected such a standard as unmanageable and inconsistent with antitrust policies. See *Stearns*, 170 F.3d at 533 n.14 (failure-to-maximize-profit test "is no longer tenable in the wake of *Brooke Group*"); *AMR Corp.*, 335 F.3d at 1118-19 (rejecting short-run profit maximizing test as a matter of law; "[c]ourts and scholars have observed that such a sacrifice test would neces-

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tion, and the antitrust laws are not balm for rivals' wounds. The antitrust laws are for the benefit of competition, not competitors." *Ball Mem. Hosp.*, 784 F.2d at 1338 (Easterbrook, J.).

sarily involve a great deal of speculation and often result in injury to the consumer and a chilling of competition"); *Barry Wright*, 724 F.2d at 235 (noting "the difficulty of deciding whether or not a firm's price cut is profit-maximizing in the short-run, a determination that hinges not only on cost data, but also on elasticity of demand, competitors' responses to price shifts, and changes in unit costs with variations in production volume.").

The Ninth Circuit's holding accordingly cannot be reconciled with the principles announced by this Court and will frustrate significant antitrust policies. It should be set aside.

C. The Decision Below Involves A Recurring Issue Of Great Practical Importance

1. The Ninth Circuit's decision is one of great importance, with implications for businesses across the Nation. As we have explained, the holding below has generated immense confusion on a practical level because it is impossible for businesses (a) to know how to comply with a "fair" and "necessary" standard or (b) to act with assurance that their legitimate buy-side competitive efforts will not result in antitrust liability. After the Ninth Circuit's ruling, businesses cannot be certain of the constraints that apply when they seek to procure valuable inputs, are asked to pay a premium for especially desirable resources, or stockpile materials that have an ongoing but unpredictable demand.

"Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 775 (1984). After all,

> antitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. * * * They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal

> language of complex rules, but in reaction to what they see as the likely outcome of court proceedings.

Town of Concord, 915 F.2d at 22.

As then-Judge Breyer explained in similar circumstances, "we ask ourselves what advice a lawyer, faced with the [Ninth Circuit's] rule, would have to give a client considering procompetitive [bidding] in a concentrated industry." *Barry Wright*, 724 F.2d at 235. And the answer to that question is that no lawyer can give confident advice on what a jury will think is an "unnecessary" purchase or an "unfair" price. Businesses accordingly will err on the side of less aggressive competition. The harm from this outcome will be felt not only by the buyers, who will be constrained in obtaining necessary inputs, but also by the sellers and small businesses that will be denied the benefit of aggressive buy-side competition for their products. The court of appeals' rule thus will "prove counter-productive, undercutting the very economic ends [it] seek[s] to serve." *Id.* at 234.

This uncertainty will be felt throughout the economy: on its face, the Ninth Circuit's ruling applies to procurement decisions of every kind of business purchasing every kind of input, including produce, natural resources, livestock, sophisticated components, even skilled employees – and there are many concentrated input markets. See Noll, *supra*, at 589-90.

Moreover, the Sherman Act's liberal venue provisions allow *any* firm conducting a national business to be sued in the Ninth Circuit. See 15 U.S.C. §§ 15, 22. We can be confident there will be no shortage of plaintiffs willing to take advantage of the opportunity to bring suit in a forum with favorable and malleable rules. As then-Judge Breyer put it, "if private plaintiffs are allowed to attack [above-cost prices], we are unlikely to lack for plaintiffs willing to make the effort. After all, even the most competitive of price cuts may hurt rivals; indeed, such may well be its object. And those rivals, if

seriously damaged, may well bring suit." *Barry Wright*, 724 F.2d at 235. Such suits can be expected to arise with some frequency: over the years there have been many cases involving overbidding and/or overbuying allegations,[12] and many more alleging buy-side exclusionary practices.[13]

2. The need for review is especially acute because the Ninth Circuit's holding has thrown the law into a state of confusion. As we have noted, this Court has moved antitrust law governing allegedly anticompetitive pricing in the direction of objective standards that leave no room for subjective, indeterminate rules. Other courts of appeals likewise have taken care to assure that antitrust rules are always "clear enough for lawyers to explain them to clients" (*Town of Concord*, 915 F.2d at 22) and do not "involve a great deal of speculation" (*AMR Corp.*, 335 F.3d at 1118-19). Against this background, the decision below is an unfortunate throwback

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[12] See, *e.g.*, *American Tobacco*, 328 U.S. at 803-04; *United States* v. *Patten*, 226 U.S. 525, 538-39 & n.4 (1913); *Seagood Trading Corp.* v. *Jerrico, Inc.*, 924 F.2d 1555, 1564-66 (11th Cir. 1991); *In re Beef Industry*, 907 F.2d at 515; *Reid Brothers Logging Co.* v. *Ketchikan Pulp Co.*, 699 F.2d 1292, 1297-98 & n.5 (9th Cir. 1983); *Houser* v. *Fox Theatres Mgmt. Corp.*, 845 F.2d 1225, 1228, 1231 (3d Cir. 1988); *Schad* v. *Twentieth Century-Fox Film Corp.*, 136 F.2d 991, 997 (3d Cir. 1943); *White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F.2d 600, 604-05 (8th Cir. 1942).

[13] See, *e.g.*, *Consolidated Foods*, 380 U.S. at 593-94; *Motion Picture Adver. Serv.*, 344 U.S. at 393; *Griffith*, 334 U.S. at 109; *Associated Press*, 326 U.S. at 9; *Crescent Amusement*, 323 U.S. at 181; *Toys "R" US, Inc.* v. *FTC*, 221 F.3d 928, 930-31 (7th Cir. 2000); *JTC Petroleum Co.* v. *Piasa Motor Fuels, Inc.*, 190 F.3d 775, 776 (7th Cir. 1999); *Balmoral Cinema, Inc.* v. *Allied Artists Pictures Corp.*, 885 F.2d 313, 316-17 (6th Cir. 1989); *Harkins Amusement Enters.* v. *General Cinema Corp.*, 850 F.2d 477, 488-89 (9th Cir. 1988); *Betaseed, Inc.* v. *U & I Inc.*, 681 F.2d 1203, 1208, 1221 (9th Cir. 1982); *Quality Auto Body, Inc.* v. *Allstate Ins. Co.*, 660 F.2d 1195, 1203 (7th Cir. 1981).

that, if left undisturbed, threatens to undo much of the progress this Court has made toward manageable, predictable, and economically supportable antitrust standards.

Faced with similarly important questions, the Court has not hesitated to grant review in antitrust cases even absent a showing of a deep conflict among the lower courts.[14] There is no reason for the Court to hesitate before granting review in this case, where the Ninth Circuit's holding departs in significant respects from the principles articulated by both this Court and other courts of appeals. Issues of monopsony in general, and of predatory buying in particular, have been examined extensively by scholarly commentators, which would assist the Court in addressing the question presented.[15] Cf. *Matsushita*, 475 U.S. at 589-90 (discussing scholarship on predatory pricing). And this case presents an ideal vehicle to clarify the rules governing predatory buying claims: the

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[14] *E.g.*, *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

[15] See, *e.g.*, Areeda & Hovenkamp, *supra*, ¶¶ 517c5, 575, 720a, 943c, 981a, 1103a1, 1637i, 1778b; see also *id.* ¶¶ 350b, 394c, 2010, 2011b, 2012b, 2135b; Blair & Harrison, MONOPSONY, *supra*, at 66-67, 154-58; R. Posner & F. Easterbrook, ANTITRUST 146-50, 719-20, 850-55 (2d ed. 1982); Blair & Harrison, *Antitrust Policy and Monopsony*, *supra*; S. Calkins, *Comments on Presentation of Steven C. Salop*, 56 ANTITRUST L.J. 65, 68 & n.18(1987); P. Hammer & W. Sage, *Monopsony as an Agency and Regulatory Problem in Health Care*, 71 ANTITRUST L.J. 949 (2004); J. Jacobson & G. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1 (1991); Kirkwood, *supra*; T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 282 n.228 (1986); F. Miller, *Health Insurance Purchasing Alliances: Monopsony Threat or Procompetitive Rx for Health Sector Ills?*, 79 CORNELL L. REV. 1546, 1563-67 (1994); Noll, *supra*; Salop, *supra*; Zerbe, *supra*.

Ninth Circuit addressed an issue of law that is unburdened by factual complications. In these circumstances, "the benefits of providing guidance" (*Brooke Group*, 509 U.S. at 230) – and of straightening out the law – counsel strongly in favor of review.[16]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[16] As we have suggested, the Court may wish to consider whether summary reversal is appropriate in this case. See, *e.g.*, *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) (summarily reversing antitrust decision that was in clear tension with prior decisions of this Court); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam) (same).